IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

LAND APPEAL NO. 100 OF 2020

(Originating from the Judgment of the District Land and Housing Tribunal for Mkuranga in Land Application No. 70 of 2016)

BAKARI SEIF MSONGORO.....APPELLANT

VERSUS

MWAJUMA SULTAN MTIEGE.....RESPONDENT

J U D G M E N T

Date of last Order:02/12/2021
Date of Judgment: 08/02/2022

T. N. MWENEGOHA, J.

This is the first appeal whereby the appellant originally filed his application in the District Land and Housing Tribunal for Mkuranga (the tribunal) claiming among other orders the declaration that the disputed land is a property of the late Fatuma Mbwana Mwangia. The Tribunal in its findings dismissed the application with costs. Aggrieved by the decision of the Tribunal, the appellant herein lodged this appeal with five grounds of appeal as mentioned hereunder:

1. **That the trial Tribunal erred in law and fact for failure to consider and evaluate well the evidence which were adduced by the Appellant and his witnesses;**

2. **That the trial tribunal erred in law and fact for not recording important evidence of the Appellant which were adduced at the hearing;**

3. **That the trial Tribunal erred in law and fact for failure to consider demeanor of witnesses;**

4. **That the trial Tribunal erred in law and fact by relying on hearsay evidence which were adduced by the Respondent's witnesses;**

5. **That the trial tribunal erred in law for failure to record names of assessors and their opinion.**

The appeal was heard by way of written submission whereby the appellant was represented by Jonas Kilimba, Advocate while the Respondent's submissions was drawn under legal aid by Advocate Damas Sixtus.

In his submission to support the appeal Mr. Kilimba began by dropping the 3rd and 4th ground appeal and proceeding to submit on the remaining grounds. He began submitting on the fifth ground that it is a mandatory requirement for the presiding chairperson to seat with two assessors who shall be required to give out their opinion before the chairman reaching the judgment. He cited Section 23(1) and (2) of The Land Disputes Courts Act, 2002, Cap 216 R. E. 2019 to stress his point. He added that when looking at the appealed Judgment, names and opinion of the assessors were not recorded as required by law. He quoted what the Chairperson recorded that;

"In the circumstance, I concur with the opinion of my assessors and dismiss the application with costs".

He submitted that, however, there is nowhere throughout the said where it indicates the name of the presiding and how they opined. That, trial chairperson acknowledges to concur with opinion of assessors who are not known and their opinion are not recorded and unknown to the appellant which is contrary to Section 23(2) of **the Land Disputes Courts Act, 2002. Cap. 216 R. E. 2019.**

He added further that **Regulation 19(2) of the District Land and Housing Tribunal Regulation of 2003** is coached also in a mandatory requirement whereas it provides a mandatory participation of assessors in providing their opinion and the same must be in writing. He submitted that the trial Tribunal contravened the procedures as far as the issue of participation of the assessors in the trial of the case is concerned as explained herein above since the Judgment does not show names and their opinion. He cited the case of **Jumanne Ally Masunga vs. Crdb Bank Plc Geita Branch** in Land Appeal No.67 of 2019 (Unreported) where **the High Court of Tanzania at Mwanza District Registry** the Court among other things held at page 4 and 5 that:

"In the instant appeal, the Chairman in his Judgment referred to assessors' opinion but the same were not recorded in the tribunal proceedings. Therefore, it seems that the assessor's opinion was not given in presence of the parties. In numerous cases, the Court of Appeal of Tanzania has been holding the position that assessors'

opinion must he given in presence of parties".

He added that the Court went further at page 6 of its judgment to provide that:

> *"..... it is clear that the records must contain written opinion of assessors. In the instant case, the opinion of the assessors were not recorded as per the requirement of the law. The Chairman merely acknowledged the assessors' opinion which never existed. Failure to record the assessors' opinion on the original proceedings and Judgment is fatal."*

He added further that in reaching to the said decision of the case mentioned herein above, the High Court reffereed also to the decision of the Court of Appeal of Tanzania in the case of **Edina Adam Kinona vs. Absolom Swebe(Shell),** Civil Appeal No. 286 of 2017 at Mbeya, where the Court of Appeal of Tanzania held that;

> *"We are aware that the original record has the opinion of assessors in writing ...However, the record does not show how the opinion found its way in the court records.... The Chairman must require every assessor present to give his opinion. It may be Kiswahili. That opinion must be in the record and must be read to the parties before the judgment is composed.*

He also cited the of **Ameir Mbarak And Azania Bank Corporation Ltd vs. Edger Kahwili,** Civil Appeal No. 154 of 2015 whereas the Court of appeal among other things held:

"In our considered view, it is unsafe to assume the opinion of the assessor which is not on the record by merely reading the acknowledgment of the chairman in the Judgment In the considered view that, assessors did not give any opinion for the tribunal's judgment and this was a serious irregularity.'

He concluded that basing on the above submissions it is his prayer that the same be upheld by this honorable Court.

Submitting on the first ground of appeal, *that the trial Tribunal erred in law and fact for failure to consider and evaluate well the evidence which were adduced by the appellant and his witnesses; he told the Court* that looking at page 4 of the trial Tribunal Judgment, the tribunal started by evaluating the respondents' evidence. That, the appellant's evidence was not evaluated and considered, at all to arrive a final decision. He added that the trial Tribunal was biased since it based only on discussing evaluating and considering the evidence of the respondent. That when one refers to pages 4 – 5 the Tribunal there is nowhere finding no anywhere the appellant's evidence was considered and evaluated However, one can see DW2, DW3 evidences for the respondent only. He invited this Court to refer to the decision of the Court of Appeal of Tanzania, in the case of **Lutter Symphorian Nelson Versus the Attorney General and Ibrahim Said Msabaha {2000} TLR 419,** Civil Appeal No. 24 of 1999, the Court of Appeal of Tanzania, at Dar es Salaam where among other things held that;

"We are left in no doubt that the learned trial judge strayed into some serious errors in his treatment of evidence laid before him, first he did not apply his mind to evidence of 17th witnesses including of PW 8,

PW4 and PW15. A Judgment must convey some indication that the Judge or Magistrate has applied his mind to the evidence on the record, though it may be reduced to a minimum, it must show that no material portion of evidence laid before the court has been ignored."

He then referred to the case of the Court of Appeal of Tanzania sitting in Tanga, the case of **Amiri Mohamed Versus Republic (1994) TLR 138**, where the Court held;

"Every Magistrate or Judge has got his own style of composing a judgment, and what vitally matters is that the essential ingredients should be there, and these include critical analysis of both the prosecution and the defense".

He concluded that looking at our case at hand there is no critical analysis of the appellant's evidence but only the respondent was critically analyzed and evaluated hence he prayed for this ground of appeal be uphold.

Submitting on the second ground of this Appeal, *that the trail Tribunal erred in law and fact for not recording important evidence of the appellant which were adduced at the hearing,* he submitted that it is reveal at page 3 of the Tribunal judgment that the tribunal failed to record properly the evidence of PW2 and PW 3. Thus, when looking at evidence recorded for PW3 it has only recorded that

"Is *wife of PW2. Also is a granddaughter of the applicants' mother. She testified that the suit house was owned by the applicant's mother'.*

It was his submission that in reality PW3 testified more than what was recorded she was the one who was living with the deceased and she knows

much more on the deceased property on which she testified much the testimonies is not in the record. He added that failure to record properly the appellant witnesses and his evidence resulted to miscarriage of justice on the appellants' rights. He then prayed for his prayer in the amended Memorandum of Appeal be granted.

In reply Mr. Sixtus started submitting on the fifth ground where averred the Appellant avers that it is the requirement of the Law that the presiding Chairman to record the names of the assessors. Mr. Sixtus submitted that it is the respondent's firm view that this averment has no legal basis and it intends to mislead the Court. He submitted that there is no such a requirement of the law wanting that the names of the assessors be adduced in the Judgment.

He added that it is their view and belief that the Trial Chairman is guided by Laws and Regulations in the course of writing a Judgment. On that basis then, it is incorrect to state that **section 23(2) of the Act** was not observed when writing the Judgment since the Trial Chairman *inter alia* noted the views of the assessors.

He distinguished the two cases cited by the appellant, those of **JUMMANNE ALLY MASUNGA (supra)** and the case **EDINA ADAM KINONA (supra)** with the scenario at hand since the two cases explains that the opinions of the assessors not being written in the proceedings and thus the resultant Judgment was totally in violation of **section 23(1) and (2) of the Act** and **Regulation 19(2) of the Regulations.**

He submitted further that The Trial Chairman did not assume the existence of the opinions of the assessors as averred by the appellant in his submission, but rather, as stated earlier, the opinions of the assessors are in the proceeding of the case and hence the case cited becomes immaterial in the circumstance. Proceeded to pray for the same be disregarded by this Court for lack of merit.

On the issue of evaluation of evidence, he submitted that the appellant is misleading this Court and missing this Court's time, as the the Judgment is very clear from the 2nd to 3rd page where the Trial Chairman evaluated the evidence of **PW1** (now the appellant herein), **PW2** and **PW3** his witnesses. He added that in those two pages, the trial Chairman explained what transpired before him in the Tribunal and thereafter went on explaining the evidence adduced by the respondent and his witnesses.

It was is his submission that the appellant has failed to explain what **PW3** narrated before the Tribunal but only keep lamenting that the Trial Tribunal has failed to record the evidence of **PW3.** He argued that this argument of the appellant is just an afterthought and the same should be disregarded by this Court. He then prayed for the appeal be dismissed with costs.

Having heard submissions from both parties, the issue for determination is whether the appeal has merits.

On the first issue whether trial Tribunal erred in law for failure to record names of assessors and their and their opinion, the appellant argued that the Trial tribunal has erred in law by not including names and opinion of the assessors in the Judgment. He referred to which section 23 (1) and (2) of

Land Dispute Court's Act which requires for the names and opinion of the assessors to be recorded in the judgment.

The appellant quoted the provisions which reads as follow:

> *Section 23(1): The District Land and Housing Tribunal established under section 22 shall be composed of one chairman and not less than two assessors.*
>
> *S.23(2) The District Land and Housing Tribunal shall be duly constituted when held by a chairman and two assessors who shall be required to give out their opinion before the chairman reaches the judgment. (Emphasis his)*

In analyzing those provisions, the appellant is of the view that names and opinion of the assessors have to be recorded in the Judgment, however, he argues that this is not the case in the appealed Judgment, as the Chairman only recorded that he concurred with the opinion of his assessors.

As there is nowhere in the said Judgment indicating the names of the assessors who presided in that case and how they opined then, the appellant is of the view that such Judgment is contrary to the law and hence there is irregularity.

Responding in this submission, the respondent replied that there is no requirement of law that the names of the assessors be adduced in the judgment.

This Court is observing that there are two issues in the above submission from the appellant. First is whether there is a failure in recording the names

of the assessors and the second whether the opinion of the assessors are not shown in the judgment.

In replying to whether there is a failure in recording the names of the assessors in the Judgment, I have gone through the cited section 23 (1) and (2) of The District Land and Housing Tribunal referred by the appellant above it is clear that it has nowhere provided a requirement to list names of the assessors in the Judgment. Therefore, the allegations of the appellant are baseless.

On the issue of the opinion of the assessors not being shown in the Judgment, the provisions cited by the appellant, **Regulation 19(2) The District Land and Housing Tribunal Regulations** does not set a mandatory requirement that the opinions of the assessors have to be reproduced in the Judgment. The said provision read as,

> *"Notwithstanding sub -regulation (I) the chairman shall, before making his judgment, require every assessor present at the conclusion of hearing to give his opinion in writing and the assessor may give his opinion in Kiswahili."*

The provisions require the opinion of the assessors to be in writing, however it does not state that the said opinion should be incorporated in the Judgment. Therefore, it is the misconception from the appellant if he believes that the law requires so. During my penisal through the record of the Tribunal, I came across a written opinion of the assessor. Therefore, this requirement was met.

The appellant has referred several cases including those of JUMANNE ALLY MASUNGA (Supra), which the Court requires the assessor's opinion be in writing and to be in the court proceedings. I agree with this position that the law requires the assessor's opinion be in writing, filed in the case proceedings and the Chairman is required to express in writing whether he is agreeing with the opinion of the assessor or not. As it was done in the appealed case. The law does not require reproduction of the assessor's opinion in the Judgment.

Therefore, this point of appeal has no merit.

In addressing the second point of the appeal as submitted, that the trial Tribunal erred in law and fact for failure to consider and evaluate well the evidence which were adduced by the appellant and his witnesses, Mr. Kilimba submitted that trial Tribunal was based since in the Judgement it based only on discussing and evaluating the evidence of the Respondent and ignored to evaluate evidence of the appellant as such evidence is nowhere in the Judgement. Mr. Sixtus in reply argued that such evaluation can be seen in the 2nd and 3rd page of the Judgment.

Having gone through the Judgment, I am satisfied that the Chairman has considered both parties' evidence. I am of the opinion that the appellant had expectation in a certain style of the Judgement. It should be noted that there is no one style of writing a Judgement. As long as the Judgement contains what is required as per the law then it is a valid Judgment. **Regulation 20 of the Land Disputes Court (The District Land and Housing Tribunal) Regulation G.N No. 174/2003** provides for content of judgment that;

"The judgement of the Tribunal shall always be short, written in simple language and shall consist of:

(a) a brief statement of facts;

(b) findings on the issues;

(c) a decision; and

(d) reasons for the decision.

I find that, the impugned Judgment meets the criteria stated above. The appellant's claim that his witness's evidence weren't evaluated is referred at page 2-3 of the Judgement where the chairman has analyzed the same. This ground also has no merits.

On the ground that the trial Tribunal erred in law and fact for not recording important evidence of the appellant which was adduced at the hearing; the appellant submitted that the Tribunal failed to record properly the evidence of PW2 and PW 3, as PW2 had testified more than what was written at page 3 of the Judgment.

Again, this Court finds that what is submitted by the appellant is a matter of style which the Chairman has used in analyzing the evidence.

I say so as the proceedings records have all the testimonies that the appellant claimed that was not recorded. It should be noted that, recording all that has been said by a witness verbatim in a Judgment is not necessary and not a requirement of the law unless such omission prejudices the evidence given and the outcome of the case. The appellant has failed to show this court that this is the case.

Having said that I find all three grounds of appeal submitted to have no merits, the appeal is therefore, dismissed with no order as to costs.

It so ordered.

Dated at Dar es Salaam this **08th** day of **February, 2022.**

T. N. MWENEGOHA
JUDGE